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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: METHYL TERTIARY BUTYL
4 ETHER ("MTBE") PRODUCTS
LIABILITY LITIGATION

00 MDL 1358
Master File
No. 1:00-1898(SAS)

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6 New York, N.Y.
7 April 26, 2016
2:30 p.m.

8 Before:

9 HON. SHIRA A. SCHEINDLIN,

10 District Judge

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1 THE COURT: Good afternoon, Mr. Wallace, Mr. Axline,
2 Mr. Miller, Mr. Gilmour, Mr. Engel, Mr. Pardo, Mr. Bongiorno,
3 Ms. Gerson, Mr. Running, Ms. Meyer, Mr. Harris, Mr. Couret,
4 Mr. Stack, Mr. Dillard, Wallace, Mr. Correll, and Mr. Goodman.
5 And all the rest of you who have come to court today, welcome.

6 Good afternoon to the folks on the phone -- there's a
7 group of you; I have a list here -- Mr. Bollar, Mr. Drake,
8 Mr. Garcia-Diaz, Mr. Goheen, Ms. Judge, Mr. Novoa, Mr. Parisi,
9 Mr. Wall, and Mr. Zorn. I hope that all the folks on the phone
10 realize that all you can do pretty much is observe and not
11 participate.

12 Ms. Burke, you're also on the phone. I'm sorry I
13 didn't mention you. In any event, please realize that you
14 can't participate. There are too many lawyers to allow for
15 on-the-phone participation, though you're welcome to listen in.

16 I was just getting started in saying we have a pretty
17 full agenda for today's conference. I received letters on
18 April 18; a joint agenda; and then the plaintiffs'
19 preconference letter, four exhibits, which were primarily
20 proposed CMOs in New Jersey, Puerto Rico, and Pennsylvania; as
21 well as the transcript of the last status conference. And
22 defendants' preconference letter of the same date, April 18,
23 also attached a proposed New Jersey CMO; and then a letter from
24 defense counsel, Ms. Gerson, to plaintiffs' counsel,
25 Mr. Axline, regarding Puerto Rico nontrial site discovery.

1 Then there were two reply letters both of April 21. The
2 plaintiffs attached exhibits again. The first was of a
3 December 22 conference before the Court. The second is the
4 defendants' interrogatories that they would like to have
5 answers with respect to the Puerto Rico nontrial site
6 discovery; a letter from Mr. Axline to Ms. Gerson regarding
7 their meet-and-confer sessions with respect to those
8 interrogatories; and then a reply letter from Ms. Gerson to
9 Mr. Axline regarding those meet and confers; and then
10 defendants' reply letter, which attached several exhibits,
11 including a letter from April 20 from defense counsel to Puerto
12 Rico plaintiffs' counsel regarding the phase II trial and
13 proposed CMOs, and then also attaching another proposed CMO and
14 a proposed Pennsylvania CMO.

15 That's a recapping of the submissions to the Court.
16 Our issues begin with the Puerto Rico case, focusing on
17 discovery, then turning to the New Jersey and Puerto Rico case
18 but with respect to phase II issues, and then the third topic
19 will be Pennsylvania. That's how I see the agenda. OK?
20 Anybody disagree? No.

21 We begin with Puerto Rico, and it starts by referring
22 back to the December 22 conference. I had a telephone
23 conference with the parties talking about how discovery should
24 proceed following the Court's reinstatement of certain
25 defendants, and I ordered the commonwealth to produce certain

1 discovery related to all defendants for statute of limitations
2 purposes at all the remaining 354 sites, but limited to certain
3 issues, hopefully, which defendants are at which site and when
4 did the commonwealth have knowledge of that participation, so
5 to speak. It was not supposed to be full site discovery, and
6 it needed to happen immediately. After that, on March the 4th,
7 2016, the defendants served four interrogatories, and the
8 commonwealth objects to the scope of three of them, the first
9 three, in fact, as being beyond what I authorized and beyond
10 really the point of these interrogatories.

11 With respect to the fourth interrogatory, which is the
12 most specific in a way, as to when the commonwealth had
13 knowledge, the commonwealth says it can respond, but it needs
14 information from the defendants to properly respond. And of
15 course defendants say it doesn't matter what information they
16 have; the statute of limitations is triggered when the
17 commonwealth has information. And then the commonwealth also
18 asks for more time to respond. Let's start with the simplest
19 question. What time does the commonwealth propose to respond,
20 and then we'll talk about the scope of it, but what time frame
21 does the commonwealth respond? Who is speaking for the
22 commonwealth? Mr. Axline.

23 MR. AXLINE: As usual, I am, your Honor.

24 THE COURT: OK.

25 MR. AXLINE: The commonwealth proposed to respond

1 within 90 days of the service.

2 THE COURT: That's true. That was in your letter, but
3 what is the defense thought? It's not exactly speedy. These
4 are old cases. Why does it have to be 90 days? And is there
5 any objection to 90 days? That's another thing. What's the
6 defendants' view of 90 days?

7 MR. HARRIS: Your Honor, I had the sort of laboring
8 oar at the December 22 telephone conference on discovery
9 issues. We don't object to 90 days, so long as we actually get
10 answers, your Honor. One of the things that has concerned us
11 is, as I think you saw from the email exchange, we said if
12 you're going to answer all of the interrogatories as written
13 without objection, 90 days is fine. If you have objections,
14 we'll give you an additional seven days. We heard nothing from
15 the plaintiffs in that respect, and we're just concerned, your
16 Honor, that what we're going to get after 90 days are
17 objections. In our discussions with the commonwealth, as I
18 understand their comments, they plan to rewrite our fourth
19 interrogatory and answer the question they want to ask
20 themselves, not the question that we have put to them.

21 THE COURT: All right. I see that starting with the
22 time frame may not be further productive. With respect to
23 document production, I didn't anticipate document production at
24 this point in time. I thought we should focus on responses to
25 the interrogatories, basically figure out what defendants are

1 at what site, and that was that at this time, and not to have
2 full classic discovery, so I didn't even anticipate at this
3 point talking about documents.

4 Now, Mr. Axline, is Mr. Harris right that you don't
5 propose to answer No. 4 as written? I thought No. 4 was the
6 one that wasn't in dispute. It was just a matter of time.

7 MR. AXLINE: No, he's incorrect. We plan to answer it
8 as written and without objections. No. 4 we have no problem
9 with.

10 THE COURT: Why didn't you know that, Mr. Harris?

11 MR. HARRIS: Because it's the first time I've heard
12 it. In the meet-and-confer we had, I understood that what the
13 commonwealth was planning to respond was the first time that
14 they were aware of MTBE. The question that we've asked goes to
15 facts that were in their possession, and if I misunderstood the
16 commonwealth, as I recall that conversation, they said we will
17 answer No. 4 as to when we are aware, which is not the question
18 we asked.

19 THE COURT: It's not the question you asked. You
20 asked for the first written report or any other communication
21 that discussed the presence of MTBE.

22 You should answer that as written and that you
23 received a laboratory report. You should answer that. And
24 that's the whole interrogatory, (a) and (b).

25 MR. AXLINE: That's what we're intending to answer,

1 your Honor.

2 MR. HARRIS: That's taken care of, your Honor.

3 THE COURT: That's taken care of, so now let's look at
4 one, two, and three and figure out what the problem is. The
5 first one says for each site identify the defendants against
6 whom each cause of action is being asserted. The statute of
7 limitations is the same for all the causes of action, right?

8 MR. HARRIS: I'm not sure.

9 THE COURT: It's one year for all of them.

10 MR. HARRIS: I'm not sure that's the commonwealth's
11 position, your Honor.

12 THE COURT: I'm asking you.

13 MR. HARRIS: Our position is yes, that the statute of
14 limitations is one year for all the causes of action.

15 THE COURT: Why does it need to be divided by cause of
16 action at all? No. 4 is going to tell you this with respect to
17 sites. No. 4(a) says at the site.

18 MR. HARRIS: I think it gets to an issue we discussed
19 on December 22, your Honor, which is we're trying to also at
20 this point in time understand which sites plaintiffs claim the
21 defendants are tied to.

22 THE COURT: It's absolutely the point, which
23 defendants are at which site. But the way you phrased it, tell
24 me the defendant against whom each cause of action is being
25 asserted, it's all about the one-year statute. That's all. If

1 you look at No. 4 and you find out when, the only question left
2 is who, so they do need to know which defendants are at which
3 site.

4 MR. AXLINE: That's a much more difficult question for
5 the commonwealth to answer. These are 354 sites, not an
6 inconsequential number.

7 THE COURT: I'm aware of that.

8 MR. AXLINE: In order to determine and make sure that
9 we know which defendant is at which site, we need to conduct
10 discovery as well, so we can tell them when the commonwealth
11 received the information that they're asking about and became
12 aware of MTBE at each of these sites without having to conduct
13 that discovery against where they sent their product and who
14 was at each site, but we can't do the "who" part of it nearly
15 as quickly as we can do the "when" part of it.

16 THE COURT: Putting aside how quickly you can do it,
17 can you do it? I mean, you've sued. At this point, you don't
18 know which defendants are at which site?

19 MR. AXLINE: We've not been allowed to conduct
20 item-wide discovery on that topic, your Honor. We've actually
21 been conducting discovery on focus sites, and frankly, it's
22 taken us quite a bit of time and effort to find out and make
23 sure that we know which defendants are at which the focus
24 sites, so we can do it. We haven't done it. That's part of
25 phase II. And frankly, our thought was that we would come up

1 with a CMO that would govern how that discovery would come
2 about, and at that point defendants jumped the gun and
3 shoehorned in these additional issues to something you
4 authorized them to do on a very narrow basis, which was to ask
5 about the timing.

6 THE COURT: But the timing as to who. They still need
7 to know which defendants are at risk at each site, so to speak,
8 and whether it's time barred.

9 MR. AXLINE: I'm not sure they do, your Honor.

10 THE COURT: How else can they move to dismiss or get
11 to agreement to dismiss when it's time barred? Or are you
12 saying, We'll admit that this whole site is time barred because
13 we knew about this contamination in 2004 and we didn't sue
14 until 2010, so obviously we're past a year, so it doesn't
15 matter who is there; the site is gone?

16 MR. AXLINE: That's sort of the way we've been doing
17 it, on a site-by-site base.

18 THE COURT: The whole site is time barred, we know it,
19 and we drop that site.

20 MR. AXLINE: That's what I thought we were discussing
21 in December, and that's the thing that makes the most sense to
22 me, if you're going to accelerate some part of the discovery.

23 THE COURT: To reduce the number of sites from 354, or
24 whatever that number was, down based on time bar.

25 MR. AXLINE: Yes.

1 THE COURT: And it doesn't really matter who, the site
2 is gone.

3 MR. AXLINE: There is one aspect, and this is
4 discussed in our letter on the statute of limitations issue on
5 which we need discovery from defendants, and I think they've
6 agreed to give that to us, but we need to get their repair
7 records, other records that might show additional releases. If
8 there's a site that there's a statute of limitations problem,
9 we then get to look at whether there may have been subsequent
10 releases that would have started the clock running anew.

11 THE COURT: True, but to do that, you would wait until
12 you could identify the sites that are otherwise time barred.
13 Hopefully that's a smaller number than 354. Some of them are
14 obviously not time barred, but in the number that is, let's say
15 it's 50, you would have to go back and say we would have to
16 concede if that's the only spill, it's time barred, so we now
17 are entitled to know whether there were subsequent releases at
18 that site.

19 MR. AXLINE: Fair point.

20 THE COURT: To do that for all 354 now doesn't make
21 sense because there will be some agreement that some are not
22 barred.

23 MR. AXLINE: We could sequence that.

24 THE COURT: Yes, you could sequence that, but going
25 back to identifying which defendants, that takes us to

1 interrogatory No. 2 because we also want to know the supplier
2 or suppliers at each site, and you're going to say, I suppose,
3 that's the same as knowing which defendants are at each site.

4 MR. AXLINE: Yes.

5 THE COURT: And it raises the same problem, you need
6 them to tell you who supplied each location.

7 MR. AXLINE: Yes.

8 THE COURT: And over what period of time.

9 MR. AXLINE: And as you know, in New Jersey and in
10 Pennsylvania, we've been talking about collectively working on
11 a master list of sites in which the defendants would give us
12 that type of information. That enterprise hasn't begun in
13 Puerto Rico, but we think it should. This is not the way to go
14 about it, though.

15 THE COURT: Well, because you don't have the
16 information, is what you're saying.

17 MR. AXLINE: Right. They haven't been instructed to
18 give it to us.

19 THE COURT: You don't have it.

20 MR. AXLINE: Right.

21 THE COURT: You couldn't answer No. 2, no matter how
22 much time you have. You don't know the suppliers and when.

23 MR. AXLINE: We might at some sites but certainly not
24 354 sites.

25 THE COURT: How about the sites you do know, because

1 No. 3 says when you're unable to answer the preceding first
2 site, then you should identify what information you need. Now
3 that you just said maybe we know at some sites, maybe the
4 defendants are right, for those sites where you know, you
5 should identify, These are the suppliers we know of, these are
6 the dates we know of releases; putting it together it's either
7 barred or not barred as to that supplier. The same with other
8 defendants: As to this site right now we can tell you, forgive
9 me for picking on you, Exxon or Shell were there, but don't
10 know anybody else who was there; it could be Conoco, it could
11 not be, but we don't know that now. That would lead you to No.
12 3. Then you could say for these 100 sites we don't know
13 anything, frankly. We know there's a release. We know when it
14 occurred, but we don't know which defendants and we don't know
15 which suppliers, so it does seem that the burden should fall
16 first on you when you can do it. As you just stood and said,
17 there are some sites where we know. Then they could at least
18 see the universe of sites that you don't know, and then it
19 would be appropriate for them to produce information to you.

20 Going backward, one, two, and three, I think they
21 should be answered for those sites where you know the answer,
22 and No. 4 you already promised to answer as written. There's
23 my ruling. You set the time frame. In 90 days you should
24 answer one, two, and three for where you do know, and No. 3 for
25 the sites you don't know, you don't have to identify what

1 information and/or documents you need. It's patent what he
2 needs. He needs to know who supplied the site and from what
3 date to what date, and he needs to know whose site it was, if
4 it can be identified as one of the operators. You know what he
5 needs, so I don't really think that the second half of three is
6 really needed. They don't have to identify the documents they
7 need; I just did. So in 90 days, answer one, two, and three as
8 amended by me in No. 3, without objections. Then the burden
9 shifts to the defendants for those sites where you can to
10 provide supplier identities and dates, and the same thing with
11 other defendants whose material was present at that site.

12 MR. AXLINE: May I add one caveat to that, your Honor?

13 THE COURT: Yes.

14 MR. AXLINE: That, frankly, sounds fine to me, but
15 sometimes we will know who owned a site at one point in time
16 but not another point in time.

17 THE COURT: Right.

18 MR. AXLINE: As long as it's clear.

19 THE COURT: If you put the dates, that's clear. You
20 can say: Our information is that Shell controlled this site
21 from 1994 to 1998. The site is still operating today, and we
22 are unaware of who supplied or who owned the site from 1998 on.
23 As long as you're specific in identifying what you do know and
24 what you don't know, the burden then shifts to the defendant to
25 supply information back to you.

1 MR. AXLINE: So the defendants will fill in the
2 blanks.

3 THE COURT: I'm hopeful. I'm hopeful, but you do have
4 to answer No. 4. You do have to say when you received a lab
5 report or when you received a written report or communication
6 as to each site.

7 MR. AXLINE: Understood.

8 THE COURT: All right. 90 days, but it's not for
9 Mr. Harris to write out long objections. That's not what it's
10 for. It's to answer the questions, all of them.

11 MR. AXLINE: That's our intent.

12 MR. HARRIS: Your Honor, if I might be heard just
13 briefly on the request for production.

14 THE COURT: Yes, but let's just pick a specific date.
15 Since today is Tuesday, we'll say July 19. Got that, July 19?
16 It's a Tuesday, so I'm sure it's 90 days, give or take.

17 MR. AXLINE: Thank you, your Honor. And then how long
18 for the defendants to fill in the blanks?

19 THE COURT: We'll get to that in one moment.

20 You were going to say something else, Mr. Harris.
21 What were you going to say?

22 MR. HARRIS: With respect to the four requests for
23 production, your Honor, the reason they were in there, we had
24 anticipated that the commonwealth would have reviewed documents
25 in order to answer the interrogatories, and we simply wanted to

1 see those documents that were germane to the answers to the
2 interrogatories. I don't think there's anything additional.

3 THE COURT: You mean if they received a lab report,
4 they should produce the lab report.

5 MR. HARRIS: Yes, your Honor.

6 THE COURT: That's easy. If they received a written
7 report, they should produce the written report, but it's not
8 broader than that. It's not anything else right now.

9 MR. HARRIS: That's correct.

10 THE COURT: If it's just No. 4(a) and (b), if there's
11 a physical paper that gave them the notice, sure, that's how
12 they answer the question: Yes, we received a lab report on
13 January 10, 1994. If you know you received it, copy it and
14 produce it.

15 MR. HARRIS: Right.

16 THE COURT: That's just to four, not to one, two, or
17 three.

18 MR. HARRIS: I think virtually all of these sites are
19 subject to a regulatory remediation program. They're being
20 cleaned up even as we sit here today, and I think we also were
21 interested in knowing any documents that identified the case
22 manager, the person that was in charge.

23 THE COURT: That is not the purpose of this at this
24 time. The purpose of this at this time is to drop sites
25 because they're time barred either in total or against other

1 defendants. Then we have a master list of sites in play. Then
2 you can answer that. Now we'll turn to Mr. Axline's question.
3 Once he supplies the information on July 19, the tables turn.
4 At that point he says, These 150 sites, we simply don't have
5 the information, but we believe the defendants have information
6 for some or all sites. You need to respond back to them. Can
7 you do that in 60 days, because it will be far less than 354?

8 MR. HARRIS: I may turn that over to Mr. Pardo. I
9 hate to be glib, but in the case of my client, Petrobas
10 arranged transportation from point A to point B, we've given
11 them everything we have.

12 THE COURT: That may be.

13 MR. HARRIS: It stops at the port.

14 THE COURT: That may be. Who wants to answer the
15 question whether 60 days from July 19 is reasonable? This is
16 going to be a smaller number than 354. It's limited
17 production. You have to talk about supply and ownership.
18 That's about it. You should know which of you supplied and
19 which of you owned a particular site, and it's going to be
20 identified by site. I would think two months from that point
21 is plenty.

22 MR. PARDO: I rise reluctantly, because I haven't
23 vetted this, obviously, with my group, your Honor, but 60 days
24 sounds like it should work. If I get significant pushback from
25 someone after this conference, I'll be sure to confer with the

1 plaintiffs and come back to you, but for now we'll be happy
2 with 60 days.

3 MR. HARRIS: I would add from the limited discussion
4 I've had with other defendants, a lot of them believe they have
5 already supplied information.

6 THE COURT: Certain ones may have, but once it's site
7 specific, once they identify to you the ones they don't have
8 any information, as I said now for the third time, it's a
9 smaller number for the whole. It's very specific. Look in
10 your records. You can figure it out. We'll say mid-September,
11 just to pick a date, September 16.

12 That takes us to the not-so-easy topic of the phase II
13 issues in New Jersey and Puerto Rico, and there's a big split
14 in the camps here on how to construct a CMO that everyone can
15 live with. I have already opined that it's my belief that the
16 phase II trial should be the final trial and that we can't have
17 100, 200, or 300 follow-on trials. The real issue is how to
18 structure that second phase II trial. Is it going to be
19 another focus site-type trial with these buckets of certain
20 parameters per bucket and everybody will agree that any case in
21 that bucket will then be governed by the verdict for that
22 bucket, so we have five buckets, based either on defendants'
23 proposal of the size of the contamination, or buckets of the
24 script of terms that describe the type of site or the type of
25 release, but that everybody would say once we've tried that

1 phase II that has carefully picked sites to fall into each
2 bucket, we're going to just agree to follow on from there and
3 apply the verdict, so to speak, to all the other ones that fall
4 into that bucket? If we take that approach, then all the open
5 sites, in Puerto Rico or New Jersey, should be assigned to one
6 of the buckets so we know in advance bucket one has 42 sites;
7 we agree to try three of those in each bucket, but the
8 remaining 39 will be governed by the three that are tried.

9 That is one way to do this, but whether that's the
10 best way is not something, I think, we can resolve without full
11 briefing, because the defendants have said they think there are
12 due process issues; they don't think a statistical sampling
13 approach applies. The idea of a bellwether trial is another
14 way to do this, one of each kind that sets either settlement
15 parameters, or something. It's not a dissimilar bucket
16 approach, it's similar, but there has to be some good faith
17 effort to say whichever method we select will govern the
18 remaining sites. You can't expect the court system to try this
19 300 times. That's for sure. So there you know my view on
20 that. But since the defense has raised what they call due
21 process issues, I'm afraid those issues must be fully briefed,
22 and that will not fall to this Court to decide the due process
23 problems that the defendant sees. All I can say, and I'm sure
24 it will be helpful to the next judge, is it should be one trial
25 phase II that resolves all the issues in the case.

1 Having said that, let me add that this leads to this
2 question of what you might call the common issues that they
3 talked about for a verdict sheet, and I know that I have that
4 here in my notes somewhere, such as: Is gasoline containing
5 MTBE a defective product? Did the defendant provide adequate
6 warnings concerning MTBE? Was the defendant negligent? Did
7 the defendant know that the gasoline containing MTBE created a
8 high probability of harm? Was the defendant in any way
9 responsible? Maybe the fifth of those is site specific and is
10 not really a nonsite specific question, but the first four are
11 generic, and they're tried once and then that finding applies.
12 You can't try the question "is gasoline containing MTBE a
13 defective product" over and over again. It's not something I
14 believe any lawyer in this room wants to do. You air it out
15 fully once. You put all your experts and witnesses on the
16 stand, the jury says it is or it isn't, and it has to apply
17 over and over again. That's a generic question. It is not
18 site specific.

19 "Was the defendant negligent," probably not site
20 specific. "Adequate warnings," I suppose the warnings could
21 differ by site, but not really. They probably differ by time
22 frame. There probably were some warnings in effect in the
23 earlier period and in the middle period and in the later
24 period, and I know the warnings were different to owners or
25 managers. There were different warnings depending on the type

1 of person being warned. But once you take into account those
2 variations, both time frame and the recipient of the warnings,
3 it doesn't change. It's the same over and over again.

4 "Did the defendant know that gasolines containing MTBE
5 created high probability of harm," those are defendants'
6 documents. I've already seen them in the one trial I had.
7 That's not something you can try over and over again either.
8 Now, I obviously didn't hear the evidence as to every single
9 different defendant in the room. I only heard it as to one
10 defendant, but sooner or later, there's a discrete set of
11 documents that shows the defendants' knowledge. And since a
12 lot of defendants are meeting together in industry groups, then
13 they knew the same things at the same time, but in any event,
14 to the extent it's defendant specific, fine, but you wouldn't
15 try that over and over again. So while I can't, because it
16 would be inappropriate for me to write a special verdict form
17 now when we don't even know the structure of the phase II
18 trial, I can't and won't do it, but I am putting on the record
19 my views, that a common issue, like "is it a defective
20 product," is tried once and then it binds you; everybody got a
21 chance to be heard. There's no reason it shouldn't have
22 reached res judicata effect. I'm sure the plaintiffs like
23 that, but I have no idea if defendants do. And maybe it's a
24 misnomer to call it a ruling, but that is the guidance that I
25 can give. Does anyone want to be heard further on the

1 so-called special verdict form, or do you at this point have to
2 say that you'll accept the guidance that I just gave on the
3 record?

4 MR. PARDO: It's guidance, correct, your Honor?

5 THE COURT: It has to be. I can't write a special
6 verdict form for a phase II trial that we haven't structured
7 yet, but I am saying loud and clear for anybody to quote to a
8 judge who is less familiar with the 16 years that I've now been
9 on the MTBE cases, I am putting on the record some issues can't
10 be retried over and over again. Who wants to be heard?

11 MR. PARDO: Thank you, your Honor. I appreciate that
12 these are for guidance purposes, and not rulings. I understand
13 that. I don't know that we would agree with all of those
14 rulings. For example, negligence, I don't think, is something
15 that can be divorced.

16 THE COURT: I think I backtracked on negligence. I
17 said that may be site specific.

18 MR. PARDO: Failure to warn, certainly, depending on
19 how they want to do it.

20 THE COURT: I don't think failure to warn is site
21 specific, and I told you why. Warnings differ depending on
22 recipients. Sometimes you deal with defendants, from what I
23 learned from the case I did try, because they already knew
24 that. They have known that forever. There's no reason to say
25 that again. Those people were, in fact, giving warnings to the

1 next guy down the line. So warnings differ depending on
2 recipient and warnings may differ depending on time frame.
3 Earlier they may have read differently than the middle and
4 later, but once you sort out those categories of time frame and
5 recipient, it doesn't differ. That's my view.

6 MR. PARDO: Fair enough. There are many possible
7 recipients.

8 THE COURT: Possible, but by category. It's still by
9 category. It's not Mr. Jones, Ms. Smith, Mr. Brown, Ms. Black.
10 It's not like that. It's suppliers, owners, operators. It's
11 categories.

12 MR. PARDO: Whether gasoline with MTBE was a defective
13 product, you're right. But remember in some cases they have
14 defective failure-to-warn claims, which may vary again by site.

15 THE COURT: We talked about that. There's no point
16 going over failure to warn again. I said it twice already,
17 time frame and recipient.

18 MR. PARDO: With the caveat, as I understand, your
19 Honor, that this is guidance for the next court, I don't think
20 I have anything else to say.

21 THE COURT: Mr. Kaufmann.

22 MR. KAUFMANN: Thank you, your Honor. I, too, accept
23 that your comments regarding special jury verdict questions are
24 guidance and there's no reason to today set forth questions
25 that might be asked of the jury years in the future. And we

1 also agree with your general principle that common questions
2 get tried once. With that being guidance, we have no problem
3 with that. I would suggest that your comment as to there will
4 be one trial to resolve all issues, that you do have the
5 ability to make that a ruling, and that was something that we
6 request be in a case management order that comes out of this
7 Court.

8 THE COURT: Isn't that where they have the due process
9 arguments that are not yet briefed? I think they deserve an
10 opportunity to brief something which they claim is
11 constitutional in nature. Due process is a constitutional
12 right. I hesitate to interpret a constitutional defense
13 without briefing. That's the problem.

14 MR. KAUFMANN: Sure.

15 THE COURT: Yes, I think there should be only one more
16 trial, but to say that a bellwether trial or bucket-approach
17 trial must govern all the cases in that bucket or all the cases
18 that look similar to bellwether, which may be saying the same
19 thing twice, must govern it, I don't know that I have the
20 authority to do that. I don't know after they write the brief
21 saying I don't and you respond to that brief what some judge
22 will recommend.

23 MR. KAUFMANN: We are not asking you to do that. We
24 are not asking you to say today that it must be a bellwether,
25 it must be this particular statistical approach.

1 THE COURT: But if it's a single trial, your only
2 other option is a trial that lasts two or three years and that
3 tries 400 sites individually in one trial. Do you really think
4 you can do that in one trial?

5 MR. KAUFMANN: We are not going to try 5,000 sites.

6 THE COURT: So that means you're trying less than all
7 sites, either by bellwether or bucket. I may be actually
8 saying the word twice, I don't know. But you are asking that I
9 say that since you say you cannot try 5,000 sites individually
10 in one trial. If the defense says we have a due process
11 challenge to a statistical extrapolation approach or bellwether
12 approach as binding -- it's one thing if we take it as
13 guidance. You try a bellwether case, you get a verdict, you
14 find out the numbers. You see what's going on with the GM
15 cases. You need to know what the settlement values are, and
16 they voluntarily say those are good exercises; we tried six
17 bellwethers; we're really prepared to wrap this up. That's
18 voluntary, but to impose a "you must fall into this verdict" as
19 a matter of law with no further opportunity to be heard, site
20 by site, where there might have been defenses, to eliminate
21 that right without briefing and the chance to write a
22 significant or serious opinion, I don't see how I can do that
23 today.

24 MR. KAUFMANN: Our concern is if you don't have the
25 guidance of a ruling that says focus your discussion and focus

1 your discovery and focus your activities on finding a way so
2 that we're not going to have a phase III, phase IV, phase V, so
3 that it goes on forever, that it will indeed go on forever.

4 THE COURT: You want a ruling that says I rule that
5 you should focus your conversations, your meet-and-confer on
6 finding a way to achieve a goal. You want me to write that?
7 I'm happy to write that. I think it's almost meaningless, but
8 I'm happy to write that, that you should focus your
9 meet-and-confer efforts on finding a way to have a single trial
10 that wraps up these cases.

11 MR. KAUFMANN: That's a step forward.

12 THE COURT: Is it?

13 MR. KAUFMANN: I think so, because I'm not sure that
14 that would be the goal of the defendants, so I would take that
15 as a step forward.

16 THE COURT: Mr. Axline.

17 MR. AXLINE: Your Honor, if I could offer a slightly
18 different perspective on this.

19 THE COURT: From Mr. Kaufmann?

20 MR. AXLINE: It's a nuance to Mr. Kaufmann.

21 THE COURT: A nuance is better than a different
22 perspective.

23 MR. KAUFMANN: I'm always happy to have Mr. Axline
24 correct me.

25 THE COURT: No, no. He said he just wants to put a

1 footnote, which is otherwise called a nuance. Go ahead.

2 MR. AXLINE: One has to look at it from the other end
3 of the telescope. It is the plaintiffs' prerogative to decide
4 how they're going to put on their case, your Honor. Ordinarily
5 a plaintiff would decide how many witnesses they're going to
6 put on, even how many claims they're going to take to a jury.

7 THE COURT: If you want to drop 4,500 of the 5,000
8 sites, the defendants won't object.

9 MR. AXLINE: I'm sure they wouldn't, but we're never
10 going to get to the point where we're talking about options
11 such as that unless the Court says to the plaintiffs, Do this
12 in one trial, and then it's up to us to figure out a way that
13 doesn't violate due process and that allows us to make the
14 claims that we want to make. That burden is on us. But until
15 we get an instruction from this Court, and you are the Court to
16 do it since you have been overseeing this.

17 THE COURT: For 16 years. I checked today.

18 MR. AXLINE: By the way, I'll just take this
19 opportunity to say we're going to miss you.

20 THE COURT: Thank you. I'll miss you, Mr. Axline.

21 MR. AXLINE: But if you can say that, then there can
22 be subsequent briefing to whoever replaces you on strategy, due
23 process, all of those things, but you know how things can drag
24 on unless there's some overarching direction from the MDL
25 judge, and this is one instance where I think that direction is

1 both appropriate and probably necessary.

2 THE COURT: All right. Mr. Pardo.

3 MR. PARDO: Your Honor, your opinion that this should
4 be one more trial is on the record.

5 THE COURT: It is.

6 MR. PARDO: This should not be reduced to a ruling.
7 It can't be. Think about what they're saying to you. They
8 can't even tell us how that trial would work.

9 THE COURT: Mr. Axline concedes that. All he's saying
10 is the ruling that it is the plaintiffs' burden to come up with
11 a way that satisfies the constitutional obligations and, of
12 course, includes due process and that is workable so that a
13 court can manage this trial, as long as they can come can up
14 with a method for doing that, the ruling is only one trial.
15 Now you figure out how to do it without violating either the
16 Court's ability to try it or the Constitution.

17 MR. PARDO: There are obviously very serious due
18 process issues.

19 THE COURT: He understands that.

20 MR. PARDO: But here's the problem. With all due
21 respect, I think it's a bit of a trap. In their view, there's
22 only one way to do a single trial.

23 THE COURT: And that is?

24 MR. PARDO: Statewide statistical extrapolation. You
25 heard it at the last conference and you heard it at the

1 conference before, New Hampshire. So with you saying and you
2 issuing a ruling that it shall be one trial, what they think
3 you're saying is it shall be statistical extrapolation.

4 THE COURT: No. If it's helpful, I am not saying it
5 should be statistical extrapolation. That may indeed be an
6 approach that the next judge approves, I have no idea, but I'm
7 not saying that. I'm just saying all things come to an end and
8 after the phase I trial, there's really only court resources
9 for one more trial.

10 I think Mr. Pardo's still speaking, then Mr. Kaufmann.

11 MR. KAUFMANN: I'm sorry.

12 THE COURT: No. Then Mr. Kaufmann. Go ahead.

13 MR. PARDO: Thank you, your Honor. What I wanted to
14 say is, again, I submit to you we are not at this decision
15 point where we should be directing a future MDL judge or future
16 trial judge that it shall be this, that, or the other thing.
17 We don't object today, we're not challenging today any
18 particular approach.

19 THE COURT: Your letters talk about the due process
20 problems in doing a statistical approach or even a binding
21 bellwether approach. Your position now is an impossible one;
22 it's we're entitled to a trial on every site. Nobody has time
23 for 5,000 trials.

24 MR. PARDO: Actually, that's not.

25 THE COURT: What is your suggestion for getting this

1 done?

2 MR. PARDO: For example, it may be informational
3 bellwethers.

4 THE COURT: May be what?

5 MR. PARDO: Informational bellwethers.

6 THE COURT: And that is?

7 MR. PARDO: An approach where you put the sites into
8 categories.

9 THE COURT: That's the bellwether.

10 MR. PARDO: We're borrowing from your idea. The
11 results are not binding, but they're just like the focus site
12 approach, which I said to you last time I think has worked
13 extremely well. I think it's being way too hard on the Court
14 to come in and suggest it hasn't worked and kick it to the
15 curb. You've resolved 130 cases on this docket, in 16 years,
16 that's a lot of time, but you got a lot of work done with the
17 focus site approach. It did work. This is a modified focus
18 site approach. To be clear, what we're saying to you today is
19 that decision doesn't need to be made yet, and here's why,
20 because we don't know what the rest of this case looks like.
21 The parties agree there's reciprocal discovery that needs to
22 happen. Once that's done, we will be able to step back and
23 assess what's really left, what's really in dispute. Based on
24 just the limited data, which isn't even fully updated yet, I
25 can tell you this case doesn't look anything like what it

1 looked like in 2010, 5,000 sites, 498 above 700. That number's
2 down to seven, and that's based on data that's still three,
3 four years old. That's my point. This case is changing.
4 While we're sitting here all these years arguing about it,
5 there's hundreds of LSRPs out there that are remediating these
6 sites. There are hundreds, probably thousands of sites in this
7 case that are nondetect or below one.

8 Our position is they shouldn't be here. We haven't
9 teed that issue up yet. We need the updated data, but we may
10 at the end of this preliminary discovery be looking at a case
11 that's 50 sites, 100 sites, maybe 150. At that point, the MDL
12 judge or the trial judge can say, You know what, that's too
13 big, you guys better figure out how you're going to do it
14 constitutionally. Or they may say it's a 50-site case, we do
15 this all the time. I'm going to put you on a clock, you each
16 get six weeks to do it. We don't know, but there will be a way
17 that they do it. There will be a way that it gets figured out.
18 What we shouldn't do now is tie that judge's hands by directing
19 him or her that it shall be this, that, or the other thing. By
20 the way, I know what you're saying today, but at the last
21 conference, you said if we go categories it may be that we need
22 to have three or four. That was your position last time. I
23 understand it may have changed, but you left open the
24 possibility there may be more than one trial. It's a decision
25 that doesn't need to be made now because this case is changing.

1 It's different. It's pivoted. Their theories are changing.
2 The facts are changing. The facts in the field are changing.
3 It looks a lot different and it will look even more different
4 once we get that updated data. It's a decision you don't have
5 to make today.

6 THE COURT: Mr. Kaufmann, you were next.

7 MR. KAUFMANN: Thank you, your Honor. I wanted to
8 correct one statement, that somehow we were trying to trap
9 somebody into a statistical analysis trial.

10 THE COURT: Right.

11 MR. KAUFMANN: We did not suggest that that must be,
12 and in fact our proposed case management order indicates that.
13 We agree with the Court that there should be one trial to
14 resolve all issues, and that is what we have in our proposed
15 case management order section No. 1. We agree with the Court,
16 and I think with defendants, that the particular structure of
17 that trial cannot and should not be decided today and that it
18 should be developed after we have the data that's necessary and
19 with consultation with the defendants and with allowing the
20 parties to do whatever it is they need to do to protect their
21 rights as they may see them. And that is why in sections five
22 and six of our proposed order, we have written that in. We
23 haven't asked for anything else. We understand the limits of
24 what should be done today and what you can do today if you were
25 staying on the bench and if you weren't staying on the bench,

1 so that's really the limited amount that we are asking for in
2 terms of future. There were some other discussions about
3 things that are due now and what the next step of discovery is
4 going to be, and perhaps we should air that later, but just in
5 terms of where we're going in the future and the general
6 contours, all we're asking really is an order memorializing
7 what you yourself have said today, and I respectfully submit
8 when we fashioned our proposed case management order, we tried
9 to get sections one, five, and six to reflect that, and we
10 would ask that that be entered, and we think that would be
11 appropriate to give us guidance, to give us purpose and give us
12 focus as Mr. Axline was talking about and also to give some
13 direction to the next MDL judge.

14 THE COURT: Mr. Harris, and then I think we need to
15 move on.

16 MR. HARRIS: Real quickly, your Honor, Puerto Rico,
17 and I'm speaking about Puerto Rico because that's the only case
18 that my client's involved in, both from the number of sites and
19 the prescription issue presents an entirely different
20 proposition for the Court, and in that regard, let's not be
21 mistaken. When they take about one trial, it's a proxy for
22 market share and statistical analysis. Mr. Kaufmann says it
23 doesn't have to be that way, but you know that's the direction
24 that the plaintiffs are going to be headed.

25 THE COURT: That they may be urging. It doesn't mean

1 the judge will accept it.

2 MR. HARRIS: But it will make the case legally much
3 more complicated, your Honor. On the other hand, and I have
4 some involvement in the proposed CMO from the defendants from
5 Puerto Rico, what we're saying is on the first site, let's
6 figure out what happens on prescription, let's do it relatively
7 quickly, I think the Court has said by September, and we also
8 said let's put together a matrix, sort of a Lone Pine order for
9 sites, and do that within a limited period of time and then
10 let's see where we are, because at that point we may find that
11 maybe one trial will work or maybe we can do this combined
12 focus approach that the Court was suggesting last week, but at
13 least we'll have the data to do it. If we get "let's put it
14 all in one trial," it's tying the hands of the trial judge.

15 THE COURT: This is one phase II trial. It does
16 follow the focus trial. We're talking about phase II.

17 MR. HARRIS: Right.

18 THE COURT: So it's already the second trial.

19 MR. HARRIS: I'm sorry.

20 THE COURT: I just had to make that clarification.

21 MR. HARRIS: But I think it's going to legally
22 complicate matters in a situation where we may find ourselves
23 not in disagreement once what we propose in our CMO is
24 accomplished.

25 THE COURT: OK. I think I've heard enough on this

1 argument and I'll reach a decision, so to speak.

2 With respect to discovery as to phase II, are you
3 still in disagreement as to producing updated site data,
4 creating the master list that we're talking about, working
5 toward voluntary dismissals, or are you working together on
6 those issues?

7 MR. KAUFMANN: We are working together on those
8 issues. We have reached some agreement. I confess to the
9 Court that that's really still in a state of flux.

10 THE COURT: The defendants' reply letter said the
11 parties are reaching agreement and will update the Court if
12 they are unable to resolve whatever issues remain with respect
13 to discovery, so maybe I should hear from them first to see if
14 there are some issues that are agreed on and there are a few,
15 hopefully, that need resolution and maybe I can help.

16 MR. PARDO: Thank you, your Honor. I'm actually a
17 little more optimistic than Mr. Kaufmann. I think we've
18 reached agreement on a lot.

19 THE COURT: Maybe, but what's left? Where are you in
20 disagreement?

21 MR. PARDO: For example, we agree on the need to take
22 discovery, and we agree on the need to update the master site
23 list, the list of sites that are in the case. Defendants'
24 position is that we have had a site list, as you know, in the
25 New Jersey case since, I think, April of 2010. We've had it

1 for six years now. Our view is that that list should be
2 updated. Plaintiffs have said to us that what they want is
3 information from us that may allow them to add new sites to
4 that list that have never been part of this case, to the extent
5 that they're identified somehow by us.

6 THE COURT: Of course they're part of this case, but
7 not specifically identified. The case involved all the New
8 Jersey sites at which there have been releases that are
9 actionable, so in that sense, they've always been part of the
10 case. That they have not been on a master site list before, I
11 accept, but that's why you yourself said we think it should be
12 updated. There are two kinds of updating. One is taking sites
13 out and one is putting sites in, but the case was always about
14 the state of New Jersey.

15 MR. PARDO: It was. That's fair point, your Honor,
16 but it was because it was so amorphous, the state of New
17 Jersey, that you directed them to prepare a site list.

18 THE COURT: I understand, but they never, I think,
19 committed that it can never have any additions as more
20 information is produced. It doesn't change the case. The case
21 was the whole state of New Jersey. In discovery, you learned
22 about additional sites. You added to the list. I don't think
23 that they're producing a site list to cabin them off from
24 adding any.

25 MR. PARDO: That may be, but here's the problem,

1 because then it becomes a bit of a moving target, much like we
2 saw in Puerto Rico, where they came back and said we found some
3 more sites. We said, Wait a second, and I think you said this,
4 at some point the case has got to be in the box, we've got to
5 know what we're dealing with, and something that wasn't put in
6 the box by a certain time period is another case, maybe, but
7 it's not this case.

8 THE COURT: That may depend if it was outside the time
9 frame. If the release occurred for the first time in 2016,
10 that may be another case, but if they now discover that there
11 was a release in 2010 but they didn't learn about it until now,
12 that's in the case, it seems to me, so it's all a matter of a
13 cutoff on future releases. This is not a case of futures, as
14 we used to say in the personal injury side. A release that has
15 not yet occurred and may not occur until 2020 is not in this
16 case. It can't be a continually moving target in that sense,
17 but if they first learned of a release that is in the time
18 frame, then it is part of the case.

19 MR. PARDO: Remember, as you know, a release in 2010
20 wouldn't be part of this case because, of course, gasoline
21 wouldn't have MTBE in it.

22 THE COURT: That's true too. Wait a minute. A
23 release that occurred in 2010, it may have been material that
24 was delivered long before but has just wasn't released.

25 MR. KAUFMANN: Just wasn't released.

1 THE COURT: Right, but why it was still there ten
2 years later, I don't know. When was it used?

3 MR. PARDO: 2004.

4 THE COURT: What's the number?

5 MR. KAUFMANN: 2006.

6 THE COURT: So it is possible that four years later, I
7 suppose, it's first released into the ground. I don't know why
8 it would be around for four years, but it's possible. Of
9 course, you're certainly right at some point it becomes less
10 and less likely.

11 MR. PARDO: It's possible, and if there was some
12 release of MTBE gasoline that occurred in 2010, I would take
13 your point, but I would still say that the purpose of that site
14 list that they were directed to create in 2010 that we've all
15 been talking about all these years, 5,200-some-odd sites, was
16 to put the case in a box so we knew what we were dealing with.

17 THE COURT: Yes.

18 MR. PARDO: The idea now that we're going to add sites
19 on to that list now, I think, just complicates the case. It
20 makes this a moving target.

21 THE COURT: I don't think so. The remaining nonfocus
22 sites haven't even had site specific discovery. There's no
23 harm done. In a way it circles back to how to try phase II,
24 because there's no harm. You have had no discovery as to
25 thousands of cases on that site list anyway. Adding five more

1 doesn't change much. You still have to figure out how to try
2 all the remaining nonfocus sites once, in my view.

3 Mr. Kaufmann, there does have to be some kind of a
4 date cutoff. I can see adding sites where you learn of
5 releases that occurred a while back that you didn't know about,
6 but what if a release happens tomorrow? You can't continually
7 add. Then you'd have a futures case.

8 MR. KAUFMANN: I agree.

9 THE COURT: Where does the date come?

10 MR. KAUFMANN: I'd be reluctant to say that today
11 because I want to confer with my client, but I don't disagree
12 with the principle the Court has set down. We agree there
13 should be a master list.

14 THE COURT: Yes, of course, there was a master list.
15 The question is adding or subtracting.

16 MR. KAUFMANN: Correct, and I don't disagree with
17 anything that you have said about that list so far, so I think
18 with that we can certainly work together to create an
19 appropriate master list with a cutoff date. I'm just not
20 prepared today to say what it is. I think that I need to talk
21 to my clients and my colleagues.

22 THE COURT: Are you considering both additions and
23 subtractions, hopefully?

24 MR. KAUFMANN: I think that both should be considered,
25 yes.

1 THE COURT: There are going to be subtractions, as
2 well as additions?

3 MR. KAUFMANN: I'm almost sure that there will be
4 additions.

5 THE COURT: You should be equally sure that there are
6 going to be subtractions since there are nondetect sites all
7 over the place. There might be time barred sites, who knows,
8 but there should be plenty of reasons for subtractions too.

9 MR. KAUFMANN: If there's no reason to keep it on the
10 list, we have no interest in keeping it on the list. If
11 there's a statute of limitations problem, it should be off the
12 list.

13 THE COURT: If turns out there is no contaminant
14 anyway, that's a reason too.

15 MR. KAUFMANN: Right. Corrected data, it's off the
16 list.

17 THE COURT: Right.

18 MR. KAUFMANN: We're not interested in making this
19 5,045 sites as opposed to 5,035 sites.

20 THE COURT: Right.

21 But when you first stood, Mr. Pardo, I said what are
22 the remaining issues to be resolved, and the first one was
23 preparing and closing the door at some point on additions for
24 sure, and subtractions I think can always be ongoing because
25 what's the harm. As I said, if they want to dismiss hundreds

1 of sites, I don't see the problem, but no more additions after
2 a date certain does seem to me to be fair.

3 First, Mr. Kaufmann, you need to figure out what is
4 that date cutoff that I just discussed and you don't want to
5 tell me until you discuss it with your clients, but once you
6 determine that, there really has to be the closed box Mr. Pardo
7 talked about. What do you propose? Is it 60 days from now and
8 that's the list, in terms of additions? You can always take
9 them off, and nobody's going to argue that their site was
10 dismissed, but in terms of adding on, you have had this case
11 running for years. There comes a point where there's no more
12 excuse to add.

13 MR. KAUFMANN: I think that the process that we had in
14 mind, and I don't think there was a disagreement about this,
15 was that there was certain information that was going to be
16 exchanged between the parties, and I think we're somewhere
17 between 85 and 90 percent, depends who we're talking about,
18 what that's going to be, and the idea was, and I thought we had
19 agreement on this, once we exchange that initial discovery that
20 we were talking about that we would work together to have a
21 master list.

22 THE COURT: What's the time schedule on that
23 discovery?

24 MR. KAUFMANN: We haven't agreed on that.

25 THE COURT: Where is the dispute? What do you

1 propose? What does he propose?

2 MR. KAUFMANN: I think it was somewhere between August
3 and October, were dates being thrown around.

4 THE COURT: That makes it easy. We'll make it the
5 same September 19 date that we just had for the other case.
6 That's all. I'm serious. It's not a laughing matter. By
7 September 19, that discovery has to close, and then by one
8 month later, which is October 14, the site list has to close,
9 other than subtractions, but that's it, and that's a ruling.
10 That's a ruling, so the discovery finishes discovery 19. The
11 master site list is complete October 14, and there will be no
12 further additions. Now, that's New Jersey. Do we need the
13 same thing for Puerto Rico or not?

14 MR. PARDO: Puerto Rico is significantly different,
15 where that case is.

16 THE COURT: Just tell me what is in dispute and I'll
17 see if I can rule.

18 MR. PARDO: OK. I'm not sure. We have not had a
19 chance to meet and confer about the CMO That's the problem.

20 THE COURT: That's a problem. I can't help you then.

21 MR. AXLINE: On this topic, your Honor, I think it
22 makes sense to take a similar approach. The commonwealth
23 should be allowed to conduct discovery as to sites that the
24 defendants may know of but that we don't know about. The state
25 has outstanding administrative orders to some defendants to

1 test at certain sites that have never been tested.

2 THE COURT: You mean the commonwealth?

3 MR. AXLINE: I'm sorry?

4 THE COURT: The commonwealth?

5 MR. AXLINE: Yes, the commonwealth. I'm sorry.

6 THE COURT: That's OK. You confused me, but go ahead.

7 MR. AXLINE: I think we should follow a similar
8 approach.

9 THE COURT: Can we follow the same schedule, that this
10 discovery exchange will be complete by September 19 and the
11 master list will be closed by October, whatever I said, 14?

12 MR. AXLINE: I think it could with one caveat, your
13 Honor, and that is this. Several years ago, we discussed these
14 lists, and the commonwealth said it would issue orders to test
15 at some of the defendants' sites for MTBE that have not been
16 tested. The commonwealth did that. One of the defendants then
17 challenged that administrative order to test in administrative
18 proceedings, and that is still hung up in administrative
19 proceedings.

20 THE COURT: In Puerto Rico.

21 MR. AXLINE: In Puerto Rico.

22 THE COURT: I can't do anything about that. Subject
23 to that problem, that whatever those administrative tests may
24 show, which could reopen the door for adding, but solely for
25 that reason, the schedule will be the same. With that one

1 exception, the list closes October 14, so long as the discovery
2 closes September 19.

3 Mr. Harris.

4 MR. HARRIS: Puerto Rico presents a unique aspect
5 because of the one year, your Honor. We have Puerto Rico 2,
6 which brings the other one down. To the extent they knew of
7 sites and knew about them a year ago, they shouldn't be added.

8 THE COURT: No, but you're going to have that
9 information from the previous ruling. Remember your four
10 interrogatories and the ruling on those four interrogatories,
11 and Mr. Axline pretty much conceded, if it's barred, it's
12 barred, but if he doesn't have any information, remember that's
13 when you have the 60 days to come back and fill in the gaps. I
14 set all those dates already.

15 MR. HARRIS: All I was getting to is it sounds as
16 though they have until September to tell us sites that aren't
17 currently on the list.

18 THE COURT: No, you have until October. What was
19 until September was the discovery exchange, similar to what we
20 just heard in New Jersey, that would allow them after the
21 exchange is complete another 30 days to produce the site list,
22 and after that point in time, subject to only these
23 administrative tests that you're litigating, no additions can
24 be made. Subtractions can always be made. That's the way I
25 see it.

1 MR. HARRIS: And we would have limitations as to those
2 additional sites, the facts when they first knew about the
3 sites.

4 THE COURT: Yes, that's interrogatory 4, which we did
5 an hour ago.

6 MR. HARRIS: OK.

7 THE COURT: Yes, Mr. Pardo.

8 MR. PARDO: Your Honor, I'm sorry if I'm confused, but
9 we had had this argument about the site list in Puerto Rico a
10 couple years ago.

11 THE COURT: Your memory is very good. Mine isn't.

12 MR. PARDO: Actually, I think your memory is better
13 than mine.

14 THE COURT: Anyway.

15 MR. PARDO: The point is at that time, there were
16 newly discovered sites, same thing kind of alluded to here, and
17 you said no, this box is closed. That's going to be PR2. PR1
18 is PR1, the 354 sites.

19 THE COURT: And we already have a PR2 case.

20 MR. PARDO: And we do have a PR2 case.

21 THE COURT: Add it to the PR2 case. If I said that
22 then and you created a second case to take care of the
23 after-discovered cases, then this recent ruling that I just
24 laid out applies solely to PR2. That's where the more recent
25 cases will go, and I call them more recent not because of the

1 release but because of the discovery of the release. It's the
2 same thing I said to Mr. Kaufmann. You can't have a futures
3 case, but if you learn of a release that occurred three years
4 ago, it's not time barred, you add it to Puerto Rico 2. That's
5 why Puerto Rico 2 was created. You're right, and thank you for
6 your memory, but there's no problem. It still stays on the
7 same schedule. It doesn't get added to one, it gets added to
8 two for the later-discovered cases. That's why there is a
9 Puerto Rico 2.

10 I think that takes us to Pennsylvania.

11 MR. KAUFMANN: Your Honor.

12 THE COURT: Yes, Mr. Kaufmann.

13 MR. KAUFMANN: I'm sorry to add another wrinkle to New
14 Jersey. We understand that the discovery has to be exchanged
15 by September 9.

16 THE COURT: I thought I said 19th.

17 MR. KAUFMANN: The 19th, but we haven't really agreed
18 on what that discovery will be.

19 THE COURT: Mr. Pardo, what is not yet resolved, and
20 we didn't get past more than two items? What is the dispute?
21 Please tee up the dispute. What is in dispute?

22 MR. KAUFMANN: If I may, I think that there are
23 certain things they have asked from us that we have agreed to
24 give to them.

25 THE COURT: OK. What's in dispute?

1 MR. KAUFMANN: There are some things that we've asked
2 of them that we don't know that they are agreeing to.

3 THE COURT: Let's find out.

4 MR. KAUFMANN: They are, your Honor, essentially items
5 two, three, and four in our proposed case management order,
6 section 4(a), (b), two, three, and four. And I don't think we
7 have agreement that we will get that, and we would like to have
8 it.

9 THE COURT: Where I do I find that? On which exhibit?

10 MR. KAUFMANN: That's Exhibit B.

11 THE COURT: To which letter?

12 MR. KAUFMANN: Plaintiffs' initial letter.

13 THE COURT: The April 18 letter?

14 MR. KAUFMANN: Yes, your Honor.

15 THE COURT: You said which numbers?

16 MR. KAUFMANN: Exhibit B.

17 THE COURT: I've got B. Which numbers?

18 MR. KAUFMANN: Roman numeral IV, subsection (a), items
19 two.

20 THE COURT: Two is sales information.

21 MR. KAUFMANN: Two and four.

22 THE COURT: Basically we're talking about sales
23 information and well information, right?

24 MR. KAUFMANN: Yes, your Honor.

25 THE COURT: OK, so in sales information you wanted

1 each defendant to provide all market share information
2 involving sales of MTBE, including, but not limited to,
3 Lundberg Survey reports; information reported to the energy
4 information administration concerning gasoline delivered for
5 sale in the state of New Jersey, including on form 7A2C;
6 consulting reports which mention or refer to market share of
7 gasoline containing MTBE. What's the objection?

8 MR. PARDO: The objection is it's not necessary to
9 determine what's at issue with the rest of the case. We should
10 be focusing on what site, what the status of the sites are,
11 what the private wells are. This is discovery to which they
12 might be entitled down the road, but remember what we're
13 talking about is the preliminary exchange of information that's
14 designed to allow both parties to put together an updated list
15 of what the sites are. Why do they need this to do that?
16 That's my first objection. My second objection is you
17 shouldn't be using, with all due respect to Mr. Kaufmann --

18 THE COURT: I know. We shouldn't be doing documents
19 in the CMO. There should be a document request.

20 MR. PARDO: Right. Sorry.

21 THE COURT: But there are only these two. No. 4 says
22 each defendant shall provide information regarding risks posed
23 by MTBE released into the drinking water. That's not site
24 specific at all.

25 MR. KAUFMANN: I will say one thing, your Honor, that

1 we didn't see the CMO. The purpose of the discovery in the CMO
2 has only been for the purpose of creating a master list. It
3 was to be able to enable us to have that discussion about what
4 phase II is going to look like. The whole purpose of this
5 exercise isn't merely to create a master list; it's to move us
6 forward.

7 THE COURT: First of all, I absolutely agree with the
8 defendants that document requests should be done under Rule 34
9 of the Federal Rules of Civil Procedure and not by listing a
10 document request within a CMO. So to the extent that Nos. 1, 2,
11 3, and 4 purport to be document requests, they have to come out
12 of the CMO anyway. To the extent that they have agreed on one
13 and three, that's good, but I think I take the defendants' side
14 on both two and four that when this trial is structured, when
15 we know what's being tried, it is worth turning to two and
16 four, but it doesn't help figure out the universe of remaining
17 sites, and that was the goal with respect to this phase II
18 problem. Again, I'm not going to rule because you're going to
19 write a document request, and under Rule 34, you can object to
20 it, and somebody's going to rule on what discovery you get and
21 don't get, but my instinct is this is not the time for two and
22 four, but one and three should be answered, and apparently
23 that's the agreement. What else is not agreed upon with
24 respect to discovery?

25 MR. PARDO: My understanding is that is it. I guess I

1 would like confirmation of what I think I've heard in our
2 meet-and-confers, and that is the databases that we've asked be
3 updated by the plaintiffs, I think they've agreed to updates,
4 produce those updated databases to us.

5 Is that right, Mr. Kaufmann?

6 MR. KAUFMANN: Frankly, I don't see how that's
7 different than a document request, but we have agreed to do it.
8 That was part of our discussion. They asked for it. We said
9 we would do it without the necessity of a discovery request. I
10 don't know that there's anything different, but we said we
11 would do it and we'll do it.

12 THE COURT: OK. That's what he sought. He sought
13 your confirmation on the record. You just gave it. What else?

14 MR. KAUFMANN: I'm sorry. There's one other thing
15 that if you're making a case management order on, prior to the
16 last case management conference, there was some discovery that
17 we each asked of each other and agreed to provide. The
18 defendants were to provide theirs by the end of this month. We
19 don't have it yet, and I don't think there's any disagreement
20 about this, but we would just like that in the case management
21 order. That is our 3(b), that by April 30 they'll provide a
22 list of discharge sites that they've agreed to give us.

23 THE COURT: I'm sorry. 3(b)?

24 MR. KAUFMANN: Yes, your Honor.

25 THE COURT: By April 30, which is around the corner.

1 MR. KAUFMANN: Right, and I don't think there's any
2 disagreement.

3 THE COURT: That's, what, this weekend? Yes, it is.
4 The defendants should provide the list of MTBE discharge sites.

5 I don't know what work is to be done to do that,
6 Mr. Pardo. Do you?

7 MR. PARDO: I can't speak for all defendants, your
8 Honor, but I do know that we agreed previously with the
9 plaintiffs that that information would be provided to them on
10 or before the end of April.

11 THE COURT: That's all I can call it, is confirmation,
12 but it applies to all defendants so all other defendants in the
13 room are bound by that date also, which clearly means Monday,
14 not Saturday, so make it May 2. Are we not ready for
15 Pennsylvania?

16 MR. HARRIS: Your Honor, on Puerto Rico, we have not
17 had a meet-and-confer with respect to their proposed CMO or
18 these requests. It's my understanding the first request
19 involving station information may be contained within their
20 fifth set of requests for documents, which is addressed in our
21 proposed CMO and has the date that the Court has provided, but
22 I don't think there's been any discussion on three. Sometimes
23 you lose site of the fact that Puerto Rico is out there, sort
24 of tagging along.

25 THE COURT: I'm not sure what you said. There hasn't

1 been any discussions on three what?

2 MR. HARRIS: I'm sorry. The CMO the plaintiffs have
3 proposed for Puerto Rico is virtually identical.

4 THE COURT: I know, you picked out one particular
5 paragraph.

6 MR. HARRIS: Right, and Mr. Pardo can correct me, but
7 I think in Roman numeral III, phase II discovery, item one,
8 station information, I believe there's a request, and
9 Ms. Gerson can correct me, a document request that the
10 plaintiffs served on the defendants.

11 THE COURT: They put these four requests in.

12 MR. HARRIS: Not the four, just one.

13 THE COURT: Just the station information.

14 MR. HARRIS: Right.

15 THE COURT: And assuming they gave you that document
16 request, what's the issue?

17 MR. HARRIS: We have said we will respond to it within
18 the deadline we have, but as to the others, I just want to make
19 clear to the Court that we have not had a meet-and-confer.

20 THE COURT: Forget about meet-and-confer, you don't
21 have a document request, and I just said they have to do it as
22 a formal document request.

23 MR. PARDO: I'm sorry to whipsaw back to New Jersey,
24 but may I make a suggestion that might help?

25 THE COURT: Of course.

1 MR. PARDO: That we take your rulings, talk, try to
2 hand this to you before close of business Friday?

3 THE COURT: Before the close of business Friday? It
4 would be acceptable to me, but not close of business Friday.
5 If I'm going to be able to sign something, today's only
6 Tuesday, by noon Thursday, so I have a chance to look at it.

7 MR. PARDO: Absolutely.

8 THE COURT: I'll hold off issuing an order, because I
9 was going to immediately start turning to an order based on
10 this transcript, but we'll try to hold off until noon Thursday.
11 Please, if you propose an order, put in all the dates I've
12 given during this conference as rulings, which means you'll
13 need a very fast transcript.

14 MR. PARDO: This is out there as much for Mr. Kaufmann
15 as for you, the release site information that we are going to
16 be updating, obviously we have only that information that we
17 have for our own sites. There are lots of sites out there for
18 which the state is either the responsible party, and that does
19 happen, or the state has information about sites that have
20 nothing to do with the defense. Sites on that list, to the
21 extent they have that information, we'd like to try to get that
22 from them, because that's necessary to update all the sites on
23 the list.

24 THE COURT: It's supposed to be an exchange of the
25 information. To the extent that they have it and you don't,

1 they're supposed to supply it to you.

2 MR. KAUFMANN: I'm not sure if Mr. Pardo is asking
3 whether we will give them something we have already agreed to,
4 in which case the answer is yes, or if he's asking for
5 something new, in which case I think it's most appropriate that
6 we talk about it.

7 THE COURT: Off-line.

8 MR. KAUFMANN: Yes. We will give them what we said we
9 will give them.

10 THE COURT: I can't know what you previously told him,
11 so you'll have to discuss it off-line, but he said there are
12 some sites that the state owns and only the state has
13 information about those sites, but that's odd because if
14 there's no defendants, those sites aren't in suit anyway. I
15 wouldn't have thought no defendants involved, but in any event,
16 you need to talk about it off-line, because I'm probably saying
17 things that are confusing.

18 That does take us to Pennsylvania, I hope. Now,
19 there's a pending motion to dismiss. I understand that. I
20 will not be deciding that. That will go to the next judge.
21 With respect to the CMO, plaintiffs want to set dates for newly
22 added defendants to respond to current discovery, to have
23 protocols for future discovery, to require disclosures of
24 defendants' relationship with release sites and market share
25 information, and meet-and-confer how to select phase I sites.

1 Defendants first say they haven't even seen the proposal until
2 it was submitted to the Court, which isn't the best way to meet
3 and confer, but I guess they've seen it now. Now that you've
4 seen the plaintiffs' proposed CMO, again, where are the
5 agreements, where are the disagreements?

6 Mr. Bongiorno.

7 MR. BONGIORNO: Thank you, your Honor. Tony
8 Bongiorno, for the defendants. Your Honor, consistent with the
9 discussions you just had in Puerto Rico and New Jersey
10 regarding process, and I don't want to get hung up on process,
11 but we usually make the sausage before we come into the
12 courtroom. We meet and confer, we give you a joint CMO with
13 areas of agreement, we brief the areas of disagreement, and you
14 decide. We were not even in the middle of that process. We
15 had started it, and we're making progress, and then lo and
16 behold, we see a proposed CMO attached to a letter.

17 THE COURT: Right.

18 MR. BONGIORNO: I don't want to whine and say they
19 jumped us and that's unfair, but it's a little early for that.
20 As we talked about, I think Mr. Kaufmann used the phrase the
21 "discussions were in flux," so I'm not ready to seek rulings in
22 New Jersey. In effect, that's where we are. If we had two
23 more conference calls, one more conference call, but a
24 conference call, we could get this Court or the next court a
25 proposed CMO with significant areas of agreement. I'm not

1 suggesting we would agree on everything. In fact, I predict we
2 won't.

3 THE COURT: Can you identify any specific areas of
4 disagreement, given my limited involvement here, that I could
5 resolve so if you're going to write up a CMO that can be signed
6 because you agree on many now and you'll agree on more as you
7 have that conference call? Can you tell me where you don't
8 agree?

9 MR. BONGIORNO: Sure. I can give you an easy one.

10 THE COURT: Good. An easy one would be very nice.

11 MR. BONGIORNO: You just ruled that market share data
12 doesn't go in the CMO, that it's a request for production of
13 documents, and there's a mirror image in the plaintiffs'
14 proposal on market share of retail stations.

15 THE COURT: Very simple. They have to put it in a
16 Rule 34 request and not in a CMO. That was easy. Do you have
17 another one, a little harder.

18 MR. BONGIORNO: We'll go up the scale, your Honor.

19 THE COURT: All right.

20 MR. BONGIORNO: For example, we suggest that nonfocus
21 site discovery should be open.

22 THE COURT: Should be open?

23 MR. BONGIORNO: Yes.

24 THE COURT: Nonfocus site.

25 MR. BONGIORNO: Discovery.

1 THE COURT: Does that mean site discovery or nonsite
2 discovery?

3 MR. KAUFMANN: I'm sorry. Nonsite specific discovery.

4 THE COURT: It's OK. Now I know what you mean,
5 nonsite specific discovery.

6 MR. KAUFMANN: Should now be open.

7 THE COURT: Who disagrees with that? Usually
8 plaintiffs would not disagree with that. They would want to
9 complete the nonspecific site discovery. What counsel is
10 speaking for Pennsylvania plaintiffs?

11 MR. AXLINE: I am, your Honor.

12 THE COURT: Mr. Axline, surely the plaintiffs would
13 want, I would think, nonsite specific discovery. Don't you?

14 MR. AXLINE: We do, but there's already provision in
15 CMO 119 that addresses the nonsite specific discovery that has
16 been occurring to date, and we see no reason to alter that
17 provision in CMO 119.

18 THE COURT: Mr. Bongiorno, what is wrong with the
19 current order? What do you need to supplement, because now
20 there's agreement that there's nonsite specific discovery going
21 forward? Where's the disagreement?

22 MR. BONGIORNO: Sure, so we're making progress, and
23 here is CMO 119. It says here's what you can go forward on:
24 Nonsite specific discovery on damages that plaintiffs allege;
25 general liability; affirmative defenses; and identification of

1 additional defendants. So we have some very smart and creative
2 lawyers in this courtroom.

3 THE COURT: Many.

4 MR. BONGIORNO: They could argue that almost any
5 nonsite specific discovery fits into those categories.

6 THE COURT: True.

7 MR. BONGIORNO: But Pennsylvania being such a
8 different state, all I've said to plaintiffs is I don't want to
9 argue every time we serve discovery whether or not it fits in
10 one of those four categories. We're into the second CMO.
11 Let's just open nonsite specific discovery and not come to the
12 Court every time there's a request for discovery.

13 THE COURT: As you said, those four sound broad enough
14 to cover all nonspecific site discovery. What would I write
15 this time saying in addition to the four topic, anything else?

16 MR. BONGIORNO: I would take the four topics out and
17 say it's open now. They wanted to limit it the first time.
18 This was a narrowing on their part because they wanted some
19 understanding of what we were focused on.

20 THE COURT: Read me the four again.

21 MR. BONGIORNO: Sure. Nonsite specific discovery on
22 damages plaintiffs allege.

23 THE COURT: Damages.

24 MR. BONGIORNO: General liability, defendants'
25 affirmative defenses, and identification of additional

1 defendants.

2 THE COURT: What else is there, Mr. Axline? Isn't
3 that the world?

4 MR. AXLINE: I think it is the world in terms of
5 subject matter, and I want to take responsibility for
6 submitting this CMO, the commonwealth's CMO, to the Court
7 before this last conference. It was my understanding from the
8 last conference that the Court wanted to make progress.

9 THE COURT: Can I get back to the point? If it's the
10 world, why not just eliminate the language and say nonsite
11 specific discovery goes forward?

12 MR. AXLINE: Because the way that discovery gets
13 carried out is important. For example, we have discussed with
14 the defendants in the last meet-and-confer session the idea of
15 putting a limitation on the number of depositions that would
16 occur each month.

17 THE COURT: It doesn't change anything to take out the
18 four categories. You would still be having discussion about
19 how many depositions to take. One side wants to take out the
20 four categories because they really cover the world anyway, as
21 you just said, of nonsite specific discovery. If it makes them
22 happy, and that's a goal here, for one side to make the other
23 side happy because it moves forward better, let's take out the
24 four phrases and move forward on all nonsite specific
25 discovery. You'll still have to negotiate how many deps and

1 when they occur, and I don't see any difference.

2 MR. AXLINE: In the New Jersey case, there was, for
3 example, in the CMO a limitation on the number of discovery
4 that.

5 THE COURT: But that's not what we're talking about.
6 All he asked is to take out those categories. He also cited it
7 as something that is in or out of the category. I agree.
8 Nonsite specific discovery is going forward fully. My
9 goodness, if you talk about damages, general liability, and
10 defenses, you've covered everything anyway. Everything. Sure,
11 let's make them happy. Whatever is at issue, we'll take out
12 the subcategories. You'll still have to negotiate, and should,
13 the schedule for getting it done, and a phased schedule: what
14 comes first; responses to document requests; the depositions;
15 how many; who is first; who is last. All that stuff is
16 obviously going to be negotiated, but it's open.

17 MR. BONGIORNO: Thank you, your Honor. Consistent
18 with your theme of making parties happy, we were talking about
19 depositions. We proposed ten each side a month. Mr. Miller
20 said he thought eight each side a month is reasonable. We said
21 we agree.

22 THE COURT: Good.

23 MR. BONGIORNO: So we have eight each side a month.

24 THE COURT: Good. What's left in dispute?

25 MR. BONGIORNO: Yes. If you'll indulge me so I can go

1 down the CMO, your Honor, there's a dispute on dates. There's
2 a section that they propose on newly added defendants, and they
3 want certain deadlines for responses to CMO 119.

4 THE COURT: That's true.

5 MR. BONGIORNO: And they propose, first, there's a
6 deadline on covered persons, which is already covered by CMO
7 119. CMO 119, the trigger date on the covered persons deadline
8 is a particular date from the time they're added.

9 THE COURT: Right.

10 MR. BONGIORNO: So I don't know.

11 THE COURT: 30 days.

12 MR. BONGIORNO: That's done.

13 THE COURT: That's done. OK.

14 MR. BONGIORNO: Then if you take their proposals (b)
15 and (c), they ask for 30 days.

16 THE COURT: All right.

17 MR. BONGIORNO: The original defendants were given 120
18 days. Someone did the math. I think that's right. So the
19 newly added defendants say, Tony, we should get 120 days also,
20 every other defendant did. So that's our request there.

21 THE COURT: That's a big difference between 30 and
22 120. Why are you so far apart on that? Can the plaintiffs
23 defend why they originally allowed 120 days for the same
24 information and now only want 30, or only want to agree to 30?
25 Why was it once 120 and now 30?

1 MR. AXLINE: The trigger for the newly added
2 defendants didn't start or wouldn't start until the CMO was
3 entered, so I think they already know. They have had quite a
4 bit of time to see with the original defendants what it was
5 they were going to be asked to provide.

6 THE COURT: Right, but they still have to take it out
7 and provide it. My view is for a quick and dirty compromise of
8 60 days. That's it. That's plenty, because I do agree with
9 what Mr. Axline has just said, that they have known this was
10 coming for quite a while. Now they have to dig it out. 60
11 days.

12 Next. Did we talk about (e), the declarations?

13 MR. BONGIORNO: Excuse me, your Honor?

14 THE COURT: For the newly added defendants.

15 MR. BONGIORNO: I apologize. I don't see an (e).

16 THE COURT: I thought there was a section 3(e).

17 MR. BONGIORNO: Your Honor, that's the site list
18 section, section 3. I was on section 2.

19 THE COURT: You finished with two, and three we took
20 care of.

21 MR. BONGIORNO: Three we haven't got to yet.

22 THE COURT: I've got it. OK. Go ahead. Now we're
23 turning to three?

24 MR. BONGIORNO: Well, I wasn't going in order, your
25 Honor. I was trying to take the easy ones first.

1 THE COURT: I must inform you I'm probably running
2 short of time now in a serious way. I don't know how much more
3 there is to do, but we have to wrap it up.

4 MR. BONGIORNO: To me, your Honor, the other
5 sections --

6 THE COURT: We could talk briefly about subpoenas.

7 MR. BONGIORNO: Yes, we could. Now that nonsite
8 specific discovery, if I get the phrase right, is open, we can
9 serve those subpoenas, we could ask the state to join in them,
10 they don't want to, we'll go at it alone.

11 THE COURT: That's fine, and any disputes that arise
12 under them should be referred to the special master.

13 MR. BONGIORNO: Sure.

14 THE COURT: That's easy.

15 MR. BONGIORNO: I guess one point that might not be
16 easy --

17 THE COURT: You know, of course, under the newly
18 revised Rule 45 that any disputes can be transferred to the
19 court where the action is pending, so it doesn't have to be
20 just an action in the venue where the subpoena is. It can be
21 back to this Court.

22 MR. BONGIORNO: May I confer with Ms. Gerson for a
23 moment? Your Honor, Ms. Gerson suggests that I might have
24 misunderstood your question, which wouldn't be the first time.
25 I apologize. If you were referring to their subpoenas to our

1 environmental consultants --

2 THE COURT: I was, yes. That's true.

3 MR. BONGIORNO: OK. I was talking about a different
4 set of subpoenas.

5 THE COURT: I see. My fault.

6 MR. BONGIORNO: No, no, no. My bad. Ms. Gerson is
7 going to address that issue.

8 MS. GERSON: Your Honor, on the plaintiffs' subpoenas
9 to the environmental consultants, again, those were served on
10 third parties. As I understand it, plaintiffs have been trying
11 to enforce it. They think they may have to file motions to
12 compel. They asked us if we object to those motions going to
13 Special Master Warner, and all we've said is we don't object,
14 but as you said, Rule 45 dictates the venue.

15 THE COURT: Yes, the venue includes right here because
16 under the revised rule it permits the other court to transfer
17 the motion to the court where the action is pending.

18 MS. GERSON: I thought it required the consent of the
19 subpoenaed party, and we were just saying can't consent.

20 THE COURT: I don't believe so. Whatever it says, it
21 says, but I believe it can be transferred back to this court,
22 and I have had this situation, but it may be the other court
23 that has to decide that.

24 MS. GERSON: I believe that's right. The only other
25 point is that plaintiffs have requested permission to serve

1 additional subpoenas. We think that would be an unusual
2 process, to request permission to serve subpoenas.

3 THE COURT: All you're saying is they don't need my
4 permission, just to serve them.

5 MS. GERSON: And that we are obviously not waiving our
6 rights to get notice under Rule 45.

7 THE COURT: That's right. The answer is easy. Don't
8 ask my permission. Serve any subpoenas you want and give
9 notice to the defense. Who is listening from the plaintiffs on
10 that? All right, do it. That was easy.

11 MR. BONGIORNO: I think the remainder of the issues,
12 your Honor, we could make great progress by meeting and
13 conferring and agree or agree to disagree at that point.

14 MR. AXLINE: There's one other provision, your Honor,
15 in the plaintiffs' version that I would appreciate your
16 attention to, and that's No. 5, limited site specific discovery
17 for the purpose of beginning to select focus sites.

18 THE COURT: Oh, yes.

19 MR. AXLINE: That's something that we had proposed,
20 and we added that this would be without prejudice to the right
21 of any party to propose a method of trial that would resolve
22 all claims. But nevertheless, since focus sites have been the
23 process de jure for so long, I think we should start meeting
24 and conferring about that. That would be an appropriate thing
25 in the CMO.

1 THE COURT: To say that the parties are directed to
2 meet and confer on the issue of selecting focus sites or on the
3 discovery needed to select focus sites?

4 MR. AXLINE: On a process for the selection, but that
5 would include the discovery.

6 THE COURT: Sure. Any defense counsel object to that?
7 That just tells you to start meeting and conferring on the
8 process and select focus sites.

9 MR. BONGIORNO: As long as we're reserving all the
10 rights, your Honor, we're not acknowledging that the same thing
11 that worked in New Jersey would work in Pennsylvania or Suffolk
12 County or anything else. We don't want to be bound to a
13 particular focus site process, but the generic meet-and-confer
14 is, of course, acceptable.

15 THE COURT: It wouldn't say that. It would say with
16 the goal of selecting focus sites. Meet and confer to develop
17 a process to select focus sites, so in that language it kind of
18 is a presumption of the focus site approach.

19 MR. BONGIORNO: May I confer one moment, your Honor?
20 That's fine, your Honor. Thank you.

21 THE COURT: OK. Is there more with respect to
22 Pennsylvania?

23 MR. AXLINE: Not for the commonwealth.

24 MR. BONGIORNO: No.

25 THE COURT: All right. Then we've completed our

1 lengthy agenda. Let me see if I can just summarize what's to
2 be done. The hope is that by Thursday noon some proposal might
3 come in that's jointly submitted. In the absence of that, I
4 will consider issuing an order based on the rulings made here,
5 although a submission would be helpful to at least encapsulate
6 the dates and rulings I did make. Other issues are left to
7 guidance. With respect to Pennsylvania, I'm not sure if I'm to
8 expect a physical submission at this point or simply work with
9 the proposed CMO and annotate it according to what was said
10 here in court.

11 MR. BONGIORNO: We're happy to meet your Thursday noon
12 deadline, your Honor.

13 THE COURT: Let's try that. That would be helpful.
14 Now are we done?

15 MR. PARDO: Are we done with the agenda?

16 THE COURT: I think we are.

17 MR. PARDO: Can I just say something?

18 THE COURT: Now we have speeches? I've been waiting
19 for that.

20 MR. PARDO: You set me up, because I don't actually
21 have a speech.

22 THE COURT: Go ahead.

23 MR. PARDO: Just on behalf of the defendants, you've
24 said this a couple times today, it's been 15 years.

25 THE COURT: 16 years, I said.

1 MR. PARDO: 16 years. I had just gotten married. Now
2 I have a kid going into high school. I've often wondered which
3 one of us was going to blink first.

4 THE COURT: We've talked about that.

5 MR. PARDO: I'd bet it would be me. As it turns out,
6 I guess it was you. But we have not always agreed. You
7 certainly have not always agreed with us, we have not always
8 agreed with you, but I do say I think you've always listened to
9 us.

10 THE COURT: I've often agreed with you. I think both
11 sides have won many issues here.

12 MR. PARDO: You've always been very careful. You've
13 always been very attentive. You are the hardest-working judge
14 I've been before. You may be one of the hardest-working people
15 I've ever met, and a privilege to know. On behalf of all of us
16 on the defense side, and plaintiffs may want to say something,
17 but I can't speak for them.

18 THE COURT: They certainly know how to speak in court,
19 so I'm sure one of them is willing to stand up and speak.

20 MR. PARDO: We thank you, your Honor, for your time
21 and patience.

22 THE COURT: You're most welcome.

23 MR. PARDO: And we wish you godspeed in all you do.

24 THE COURT: Thank you. And I do have to say on the
25 record that I was sent some very lovely flowers. I hope the

1 plaintiffs were aware of that yesterday. They arrived from the
2 defendants. I assure you that it did not influence any ruling
3 today at all, but I'm very appreciative for the beautiful
4 flowers. They will be displayed tomorrow at a court-provided
5 party.

6 Yes, Mr. Kaufmann.

7 MR. KAUFMANN: There is a certain advantage to
8 plaintiffs in going last, a disadvantage in that Mr. Pardo, of
9 course, has said a lot of the same things that we feel, and we
10 echo our sentiments. I can tell you that I think the highest
11 praise that I personally can give to a judge is that you've
12 always been prepared and you've always decided, and as a
13 litigant, we have no right to expect anything more, and you
14 have given us that and more. You've given us, I hate to use
15 the word "guidance" as opposed to ruling today, but you have
16 given us guidance, and I don't know that this case could have
17 progressed but for your firm, and very firm at times, hand on
18 it. I personally thank you for all the courtesies that you've
19 given to us. On behalf of, I think, all the plaintiffs and
20 certainly on behalf of my client, it was a professional
21 pleasure to be in your court. Those of us who try cases, those
22 of us who are in court know that the quality of a judge is
23 extremely important, and unfortunately it varies quite a lot.

24 THE COURT: Yes, it varies.

25 MR. KAUFMANN: But I've always told my colleagues, if

1 you can get in Judge Scheindlin's court, you'd better be
2 prepared because she will hold you to high standards, but
3 that's only because she has the highest standards for herself,
4 and she always effectuates those standards. We really do
5 appreciate it. We wish you the best of everything in your
6 future endeavors, and it really is our hope that we get to see
7 you again.

8 THE COURT: Thank you. Very nice speeches. You're
9 wonderful lawyers, all of you. I've told many people that this
10 is the case to get because the lawyers are so fine. Thank you
11 for your courtesies. You have always been very courteous with
12 each other and with the Court, and it's been a pleasure to
13 preside over this case. I will miss it. I was hoping it would
14 be my last court appearance, but somebody snuck in saying, We
15 need one more conference, maybe one more argument. I was asked
16 today, Is this your last conference, and I would have liked to
17 have said yes. So, again, thank you.

18 (Adjourned)
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